91-885

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RANDALL A. DETRO,
Petitioner

v.

BUDDY ROEMER, *et al.*,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

What is the appropriate Fourth Amendment standard for seizures made pursuant to a warrantless workspace search?

Did petitioner, Randall A. Detro, timely file a complaint under 42 U.S.C. § 1983?

Was Summary Judgment properly granted before opportunity for discovery and when genuine issues of material fact existed?

LIST OF PARTIES

The parties to the proceedings below, and before this Court are:

Plaintiff:

Randall A. Detro

Defendants:

(1) Buddy L. Roemer

(2) Bill Lynch

(3) David Morales

(4) Elizabeth Schexnayder

(5) Joe Green

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, RANDALL A. DETRO, respectfully petitions this Court to issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceedings.

OPINIONS BELOW

Opinion of the United States Court of Appeals For the Fifth Circuit dated May 3, 1991, which was not reported (Appendix, page 1a).

Order and Reasons of the United States District Court, Eastern District of Louisiana dated June 27, 1990, following motion for new trial (Appendix, page 6a).

Judgment of the United States District Court, Eastern District of Louisiana, dismissing plaintiff's complaint (Appendix, page 9a).

Order and Reasons of the United States District Court, Eastern District of Louisiana dated June 4, 1990, following motion for summary judgment (Appendix, page 10a).

Order and Reasons of the United States District Court, Eastern District of Louisiana dated March 26, 1990, following motion to dismiss (Appendix, page 16a).

Opinion of the United States Court of Appeals For the Fifth Circuit dated May 29, 1991, following petition for rehearing (Appendix, page 25a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review a decision of the United States Court of Appeals for the Fifth Court by writ of certiorari after rendition of judgment. The decision for which review is sought was entered on May 3, 1991. (Appendix, Page 1a). A petition for rehearing was timely filed, and rehearing was denied on May 29, 1991. (Appendix, Page 25a)

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 4, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Louisiana Civil Code, Article 3492 provides:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

STATEMENT OF THE CASE

This case presents issues of potential 42 U.S.C. § 1983 liability stemming from an investigation by the Office of The Inspector General of the State of Louisiana on the campus of Nicholls State University located in Thibodaux, Louisiana.

Plaintiff Randall A. Detro (hereinafter referred to as Detro) was employed at Nicholls State University for thirty years as the Director of the Ellender Memorial Library and a professor of geography. On December 22, 1988, Detro was relieved from his duties as Director of Ellender Memorial Library based upon a report issued by the Office of the Inspector General on December 19, 1988 at a press conference. The news media publicized Detro's discharge from his position on December 24, 1988.

In July of 1988, as part of the investigation being done by the Office of the Inspector General, Detro's office was searched and padlocked. Detro was denied access to his personal books, papers, and other personal effects. His office remained padlocked until his dismissal as Director

of Ellender Memorial Library. Thereafter, the locks were changed and the key was given to an assistant at the Library with instructions not to let anyone enter Detro's offices. In May of 1989, some of Detro's personal property was returned to him, and as of the date of the filing of his complaint, some of his personal property had not been returned.

Detro filed suit against the defendants, Buddy L. Roemer, Governor of Louisiana, Bill Lynch, Inspector General of Louisiana, David Morales, Elizabeth Schexnayder, and Joe Green, investigators for the Office of the Inspector General, in the United States District Court, Eastern District of Louisiana on December 22, 1990. Detro sued the defendants under 42 U.S.C. § 1983 for violating his civil rights during the investigation. His complaint alleges that his First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated during the course of the investigation from June 1988 through December 1988.

On March 5, 1990, defendants filed a motion to dismiss under F.R.C.P. 12(b)(1) and 12(b)(6), asserting that the Court lacked subject matter jurisdiction and that the plaintiff's complaint failed to establish a claim under § 1983 and § 1985. Plaintiff filed an opposition to defendants' motion to dismiss on March 13, 1990, accompanied with a motion to file an amended complaint which was granted by the Court. The court ordered that the motion to dismiss be heard on the briefs without oral argument, and on March 21, 1990, the Court rendered an Order finding that plaintiff's claim was not barred by the Eleventh Amendment and that plaintiff's complaint stated facts which, if true, would defeat defendant's claim of qualified immunity. The Court further found that plaintiff's complaint failed to state a § 1985 claim, a § 1983 claim for violation of First Amendment rights, and a § 1983 claim for denial of a name-clearing hearing. The Court did find that plaintiff's complaint stated a § 1983

claim for violation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights. (Appendix, Page 16a)

On April 26, 1990, defendants filed a motion for summary judgment. Plaintiff filed an opposition to the motion for summary judgment. The district court ordered that the motion for summary judgment be heard on the briefs without oral argument, and on May 30, 1990, the Court rendered an Order granting defendants' motion to dismiss plaintiff's civil rights claims. (Appendix, Page 10a) The district court decided that plaintiff's claims for deprivation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights were separate wrongs which did not comprise a continuing violation. The court then examined each claim separately and found that each claim was barred by the one year prescriptive period established in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 1947-1950 (1985). Judgment dismissing plaintiff's civil rights claims was rendered on June 6, 1990. (Appendix, Page 9a)

Plaintiff filed a motion for a new trial on June 11, 1990, which was denied by the district on June 27, 1990. (Appendix Page 6a)

A notice of appeal was filed on June 29, 1990. The Court of Appeals, Fifth Circuit, rendered its decision on May 3, 1991. (Appendix, Page 1a)

A petition for rehearing was also denied by the Court of Appeals without opinion. (Appendix, Page 25a) The case is now before the Supreme Court for final review.

REASONS FOR GRANTING THE WRIT

WHAT IS THE APPROPRIATE FOURTH AMENDMENT STANDARD FOR SEIZURES MADE PURSUANT TO A WARRANTLESS WORKSPACE SEARCH?

The reasonableness of a government employee's expectation of privacy in his workplace was established by the Supreme Court in *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714, 94, L.Ed.2d 714 (1987). In *Ortega*, the desk and files of a state employee was searched by a hospital investigation into charges of work-related improprieties. During the search, several personal items were seized. *Id.* at 1495-96. Ortega brought an action under 42 U.S.C. § 1983 against several hospital administrators alleging that the search violated his Fourth Amendment rights. This court, reversing a grant of summary judgment to the government supervisors, held that Ortega's expectation of privacy was reasonable and that the search violated his Fourth Amendment rights.

The Fifth Circuit, relying on *Ortega*, concluded that the defendants' actions in this case did not constitute an unreasonable search. The Fifth Circuit also found that Detro was not deprived his personal property and there was no violation of his Fourth Amendment rights. Because the court found no constitutional violation with regard to the seizure, it found no need to address Detro's argument that the seizure constituted a "continuing violation". (Appendix, Page 1a)

Petitioner respectfully argues that the Fifth Circuit Court of Appeals misapplied *O'Connor v. Ortega*, 480 U.S. 709, 94 L.Ed.2d 714, 107 S.Ct. 1492, in determining that there was no constitutionl violation of Detro's 4th Amendment rights for the seizure of his personal property. The Supreme Court in *Ortega* specifically noted that it did not decide the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items. The Court stated in a footnote at 94 L.Ed.2d 714, 730:

> "We have no occasion in this case to reach the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items."

The case of *Ortega* only addressed the standard required to search; it did not address the standard required to seize. There are important differences between a search and a seizure. A "search" for Fourth Amendment purposes occurs when the government infringes expectation of privacy. A "seizure" occurs for Fourth Amendment purposes when the government meaningfully interferes with an individual's possessory interest in property. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir.). The Fifth Circuit Court of Appeals discussed the search of Detro's office and applied the reasonableness test of *Ortega* to determine that the search and seizure was not unreasonable. Petitioner respectfully urges that the Fifth Circuit Court of Appeals did not properly address Detro's claim of violation of his Fourth Amendment privilege against unreasonable seizure which is separate and distinct from his Fourth Amendment privilege against unreasonable searches. *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *U.S. v. Giannetta*, 909 F.2d 571 (1st Cir. 1990).

DID PETITIONER, RANDALL A. DETRO, TIMELY FILE A COMPLAINT UNDER 42 U.S.C. § 1983?

In *Wilson v. Garcia*, 471 U.S. 261, 276-280, 105 S.Ct. 1938, 1947-1950 (1985), the Supreme Court held that the appropriate statute of limitations to be applied in all § 1983 actions is the state statute of limitations of one year which govern actions for personal injury. Thus, the petitioner's claim is subject to the one year prescriptive period for delictual actions set out in LSA-C.C.P. Art. 3492.

Although state law governs the substantive limitation period, federal law determines when a civil rights action accrues, and therefore, when the statute of limitations

begins to run. *Perez v. Lardeo Junior College*, 706 F.2d 731 (5th Cir. 1980).

In *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980), the Court held that a cause of action under § 1983 accrues when "the plaintiff is, or should be, aware of both the injury and its connection with the acts of the defendant."

Detro's complaint alleges violations of constitutional rights under 42 U.S.C. § 1983. Detro alleges that during the course of the investigation conducted on the campus of Nicholls State University defendants seized his office, padlocked his office, and denied him access to his professional and personal property. Detro alleges that his personal property remained seized until the summer of 1989, and continued as of the time of the filing of his complaint.

Detro alleges that he was interrogated on July 15, 1988 without being advised of the allegations against him and that he was interrogated without counsel. He alleges that the defendants were conducting a criminal investigation; that he was ordered to his office for interrogation at which time he was not free to leave; and that this interrogation continued for days until he became ill. His final interrogation was conducted on August 11, 1988.

Detro alleges that he was not supplied with the evidence against him, not given the names of witnesses or informants who made allegations against him and denied an opportunity to present evidence on his behalf.

Detro alleges that on December 19, 1988, defendant Bill Lynch held a press conference on the Nicholls State University campus at Thibodaux, Louisiana and distributed a written report which contained the results of an investigation of Nicholls State University. The report contained libelous, slanderous, unfounded, and untrue statements concerning the misconduct, and mismanagement on the part of Randall Detro in his capacity as the Director of the Library of Nicholls State University.

Detro alleges that following the press conference and news release he was removed from his position as Director of the Library at Nicholls State University.

In support of Detro's opposition to the motion to summary judgment, he argued that in connection with the acts of the defendants there were numerous newspaper articles published. When the search and seizure took place, this fact was made known to the public. When Detro was relieved from his position as Director of the Library, this fact was made known to the public.

Petitioner's original complaint and his opposition to the motion to summary judgment with attached affidavits identified the following chronology of events:

On July 15, 1988, plaintiff was ordered by Dr. Ayo to meet with the Office of the Inspector General at his office;

On July 20, 1988, plaintiff's office was padlocked;

On July 25, 1988, newspaper publication regarding the padlocking of his office.

Numerous interrogations during the months of July and August.

On August 11, plaintiff met with David Morales and Elizabeth Schexnayder for questioning.

On December 19, 1988, Inspector General Bill Lynch held a press conference releasing the report on Nicholls State University;

On December 22, 1988, Dr. Donald Ayo, President of Nicholls State University, informed plaintiff that he was being relieved from his position as Director of the Ellender Memorial Library.

On December 24, 1988, newspaper publication regarding Detro's removal from his position on December 22, 1988.

On January 27, 1988, plaintiff received a letter from Dr. Arnold Ayo, President of Nicholls State University, relieving him of his position as Director of the Library.

After May 1, 1989, some of plaintiff's personal effects were still under lock at the Nicholls State University library.

The district court found that Detro's claims for deprivation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights were separate wrongs which did not comprise a continuing violation. The Court went on to examine each claim to determine whether it was barred by the applicable statute of limitations. The court found that except for his discharge, all of the events occurred more than one year before the filing of the complaint. Accordingly, the court dismissed the complaint as being time barred. (Appendix, Pages 10a, 9a)

This Court is *Delaware State College v. Ricks*, 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980) in discussing the "continuing violation" of civil rights laws stated:

> " "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful . . . (citations omitted) . . . . It is simply insufficient for Ricks to allege that his termination gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination . . . The emphasis is not upon the effects of earlier employment decisions; rather, it is upon whether any present violation exists." *Id.* at 66 L.Ed.2d 431. 440

Petitioner urges that the acts of the defendants were not a series of unrelated and isolated instances, but a series of continuous constitutional violations. Although there were differing constitutional violations (Fourth, Sixth, Fourteenth Amendment) there was always an accompanying news release which gave rise to a violation of a

liberty interest in petitioner's employment. There was a continuing policy or pattern of violation throughout the investigation conducted by the defendants. Petitioner urges that the acts of the defendants were continuing unlawful acts, not merely continual ill effects from an original violation and that defendants actions constitute a continuing violation under 42 U.S.C. § 1983. Certainly, at the time of the filing of petitioner's complaint there was a present violation of unreasonable seizure of his personal property.

Even if the acts of the defendants are found not to constitute a continuing violation, petitioner urges that his complaint is not time barred with regard to his removal as Director of Ellender Memorial Library on December 22, 1988 and the contemporaneous newspaper coverage which occurred on December 24, 1988.

A review of the Order and Reasons of the district court dated March 26, 1990 (Appendix, Page 16a) shows that the district court found that petitioner's complaint failed to state a § 1983 claim for the denial for a name-clearing hearing, but the analysis of his Fourth Amendment rights did not end there. The court found that petitioner's complaint stated additional claims under the Fourteenth Amendment, namely, his discharge from public employment plus deprivation of Fourth Amendment rights gave rise to a liberty interest under *Marerro v. City of Hialeah*, 625 F.2d 499, 513 (5th Cir. 1980). Additionally, the district court found that petitioner stated that he was discharged without an opportunity to be heard which stated a claim under the Fourteenth Amendment even though his name-clearing complaint was deficient. All of Detro's liberty interests claim for violation of his Fourteenth Amendment rights were not dismissed by the district court. Only his name-clearing claim was dismissed.

In the district court's Order and Reasons on plaintiff's motion for a new trial, (Appendix, Page 6a) the district court addressed several possible claims arising from the

discharge of a public employee under circumstances that impact on his reputation. The court discussed deprivation of a property interest and concluded Detro had no such claim. The court also concluded that Detro had no name-clearing claim. The court went on to discuss Detro's liberty interest claim under *Marerro* and found that it had prescribed since the report criticizing him was issued on December 19, 1988 and his complaint was filed on December 22, 1989. However, the court did not discuss Detro's liberty interest claim under the Fourteenth Amendment for the denial of right to be heard following his dismissal on December 22, 1988 and the contemporaneous publication in the newspaper on December 24, 1988.

In this case, petitioner has alleged more than mere defamation. He has alleged that the defamation which occurred on December 24, 1988, in connection with his dismissal without any opportunity to be heard, and the district court found that he has stated a claim upon which relief can be granted even though his name-clearing complaint has been dismissed.

The Supreme Court has consistently held that an essential principle of due process is that a deprivation of life, *liberty*, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S.Ct. 652 (1950). In *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971), the Supreme Court stated:

> "Yet, certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. [Citation omitted.] 'The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' [Citation omitted.].

This court has found that the necessary elements of the deprivation of one's liberty interest are the contemporaneous discharge and the publication addressed to the public regarding his discharge. The Supreme Court in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) stated:

> "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." (quoting *Wisconsin*, supra.)

Here as in *Owen*, even though it was found that plaintiff possessed no property interest in continued employment, he was deprived of a liberty interest without due process by the issuance of a report and the contemporaneous discharge and prominent news coverage of his dismissal on December 24, 1988. Plaintiff's suit was filed on December 22, 1989, and was timely as to the damages flowing from his removal as Director of Ellender Memorial Library on December 22, 1988 and the contemporaneous newspaper publication on December 24, 1988.

In this case, petitioner was informed by Dr. Donald Ayo, President of Nicholls State University, on December 22, 1988 that he was being relieved from his duties as Director of the Ellender Memorial Library. (A formal letter confirming this conference was mailed to petitioner on January 27, 1989.) The news media publicized plaintiff's discharge from his position on December 24, 1988. These actions took place after the December 19, 1988 report. Under *Wilson v. Garcia*, 471 U.S. 261, 276-280, 105 S.Ct. 1938, 1947-1950 (1985) and *Lavallee v. Listi*, 611 F.2d 1129 (5th Cir. 1980), December 24, 1988 must be considered as the date a liberty interest violation of the Fourteenth Amendment occurred and damage was sustained and as such is determinative of the timeliness of petitioner's complaint.

Neither the district court, nor the court of appeals addressed this issue and made no findings in this regard.

Petitioner's complaint has been dismissed by the district court. The court of appeals has affirmed the dismissal and no court has addressed the occurrence of petitioner's removal from his position as Director of Ellender Memorial Library on December 22, 1988 and the contemporaneous publication by the news media on December 24, 1988 in connection with his dismissal. Petitioner urges this court to address this issue because petitioner has alleged a constitutional violation which renders his complaint timely filed on December 22, 1989.

WAS SUMMARY JUDGMENT PROPERLY GRANTED BEFORE OPPORTUNITY FOR DISCOVERY AND WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED?

This Court has outlined the requirements for disposition of a summary judgment motion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This Court held that Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322, 106 S.Ct. at 2552 (emphasis added). Petitioner urges that he has not even had time to conduct any discovery in this case and that the motion for summary judgment was premature in this case.

Both courts below overlooked genuine issues of material fact concerning the search and seizure, the continuing seizure of petitioner's property, and the continuing policy of harassment of the petitioner.

CONCLUSION

Since the filing of his complaint, petitioner has suffered a frustrating experience. Defendants filed a motion to dismiss and the district court told him that he stated allegations sufficient for his complaint. Defendants filed a motion for summary judgment alleging there were no genuine issue of fact and the district court dismissed his complaint saying his complaint had prescribed. He appealed the district court's decision to the court of appeals on the issue of prescription and the court of appeals found that there was no seizure of his property. Petitioner pleads with the Supreme Court, his last resort, to review his case and straighten out this litigation maze which has foreclosed him from access to the courts and his right to have his day in court.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3486

RANDALL A. DETRO,
Plaintiff-Appellant,

v.

BUDDY ROEMER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-89-5455-F)

(May 3, 1991)

Before CLARK, Chief Judge, RONEY,[1] and DUHÉ, Circuit Judges. DUHÉ, Circuit Judge:[2]

The appellant Detro challenges the district court's dismissal of his section 1983 claim, arguing that the acts of

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[1] Circuit Judge of the Eleventh Circuit, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

which he complains are not prescribed under the applicable one-year statute of limitations. Because we find the district court properly resolved the limitations issue, we affirm and adopt its opinion. *See Detro v. Roemer*, No. 89-5455 (E.D. La. Mar. 21, 1990).

The district court did not address whether the acts of which Detro complains constitute continuing violations for the purpose of tolling the one-year limitations period. Although our conclusion regarding this issue does not alter the district court's result, we write separately to address that contention.

Facts and District Court Proceedings

A routine administrative audit conducted by the state Inspector General at Nicholls State University revealed discrepancies in the library's inventory. The ensuing investigation focused upon the appellant Detro, a tenured geology professor then serving as library director. The investigation revealed that Detro had failed to follow state guidelines on purchasing, tagging, and cataloging rare books, maps, and photographic equipment acquired with university funds. In July of 1988, Detro's office in the library was searched and padlocked, and Detro was questioned by state auditors. A local newspaper learned of the investigation, and published several articles concerning Detro's alleged misdeeds in late July of 1988.

On December 19, 1988, the Inspector General's Office published a report detailing its findings, and recommended "appropriate administration" with regard to Detro. However, at no time was Detro arrested or made the subject of a criminal investigation.

Detro filed suit on December 22, 1989 under 42 U.S.C. §§ 1983 and 1985, asserting violations of his fourth, fifth, sixth, and fourteenth amendment rights. The section 1985 claim was dismissed on a Federal Rule of Civil Procedure 12 (b) (6) motion, as was Detro's section 1983

claim for deprivation of a "liberty interest." [3] The defendants filed a motion for summary judgment arguing, *inter alia*, that the remaining section 1983 claims were barred by prescription. From the district court's grant of summary judgment on that ground, Detro makes this appeal.

Continuing Violations

Detro virtually concedes that the majority of the acts of which he complains were discrete and insular events that occurred more than one year before the date suit was filed. However, Detro argues that the continued retention and control by the university of some of his personal belongings constitutes a "continuing violation" [4] of his fourth amendment guarantee against unreasonable searches and seizures. Because we find the search of Detro's office and the seizure of some items within it reasonable, and thus not a violation at all, we need not consider whether it constitutes a "continuing violation."

In *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) the seminal case on workplace searches, a hospital investigative team searched the office of a staff physician suspected of misappropriating hospital funds and property. Although a plurality of the Court concluded that Ortega had a reasonable expectation of privacy in his office and its contents, it declined to

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[3] The court granted the 12 (b)(6) motion on the ground that Detro failed to request a "name clearing hearing" as required by Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Detro does not appeal the dismissal of those claims by the district court.

[4] In *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983), the court distinguished between "discreet, isolated, and completed acts which must be regarded as individual violations," "acts related closely enough to constitute a continuing violation." In doing so, the court considered whether the challenged acts (1) involve the same subject matter, (2) are of a recurring nature, and (3) display a degree of permanence. Because we resolve this case on another basis, we need not undertake this analysis.

impose traditional fourth amendment standards upon public employers in the workplace. Noting that "the concept of probable cause has little meaning for a routine inventory conducted . . . for the purpose of securing state property," the Court held that "public employer intrusions on the constitutionally protected privacy interests of government employees . . . for investigations of work-related misconduct should be judged by the standard of reasonableness. . . ." *Id.* at 725, 107 S.Ct. at 1502. This reasonableness inquiry is two-fold: first, the Court must determine "whether the . . . action was justified at its inception." *Id.* at 726, 107 S.Ct. at 1502. Then, it must determine whether "the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (internal quotation marks and citations omitted).

Applying that paradigm, we conclude that the appellees' actions did not constitute an unreasonable search. The summary judgment evidence reveals that the Office of the Inspector General conducted a routine administrative audit of Nicholls State University pursuant to state regulations. The audit identified discrepancies between the library's inventory and purchasing records, and alerted the auditors to possible noncompliance with state cataloging and bid regulations. Thus, there were "reasonable grounds for suspecting that the search [would] turn up evidence that the employee [was] guilty of work-related misconduct." *O'Connor*, 480 U.S. at 726, 107 S.Ct. at 1502. Accordingly, the first prong of the inquiry is satisfied.

The summary judgment evidence also reveals that the search was properly executed, thus satisfying the second prong of the inquiry. The state auditor contacted Detro and informed him that his office would be searched and its contents inventoried. Detro was present during these searches, and was afforded an opportunity to establish ownership of the items stored in the office. When he

could establish ownership of a book or map, he was permitted to take it with him. Detro has failed to identify any particular item still under seizure, but instead alleges in conclusory terms that he has been deprived of "personal property." We find no such deprivation, and no violation of Detro's fourth amendment rights.

Having addressed both prongs of the *O'Connor* test, we conclude this work-related search was reasonable. Because we find no constitutional violation, we need not address Detro's argument that the seizure of his property constitutes a "continuing violation." The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-5455

SECTION "F"

RANDALL A. DETRO

v.

BUDDY ROEMER, *et al.*

ORDER AND REASONS

[Filed June 27, 1990]

In its order of May 30, 1990, the Court granted defandants' motion for summary judgment and dismissed plaintiff Randall Detro's § 1983 complaint as time-barred. Plaintiff now moves for a new trial.

Detro urges a new trial on two grounds. First, he contends that the Court erred in ruling that his Fourteenth Amendment claim of deprivation of a liberty interest in his reputation is time-barred. Second, he argues that the Court erred in ruling that plaintiff's claims for deprivation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights are separate wrongs. Neither of these contentions merit a new trial.

The discharge of a public employee under circumstances that impact on his reputation gives rise to several possible claims. If the employee can prove a property interest in his continued employment, he may claim that the state deprived him of this property without due process of law. *Cleveland Board of Educ. v. Loudermill*,

470 U.S. 532, 105 S.Ct. 1487 (1985). Such a claim does not involve the damage to the employee's reputation, rather it focuses on the source of the employee's interest in his continued employment and the circumstances surrounding his discharge. Detro does not bring such a claim here.

Although a public employee may not have a property interest in his continued employment, his discharge under circumstances that put the employee's reputation at stake gives rise to a liberty interest under the Fourteenth Amendment which entitles him to a procedural opportunity to clear his name. *Rosentstein v. City of Dallas*, 876 F.2d 392 (5 Cir. 1989). In this case, Detro claims that the announcement of his discharge at the news conference at which the findings of the investigation of the Nicholls State library were announced put his reputation at stake and entitled him to a name-clearing hearing. In its order of March 21, 1990, the Court held that Detro's complaint failed to state a § 1983 claim for the denial of a name clearing hearing upon which relief can be granted. Consequently, the Court did not address this claim in ruling upon the defendants' motion for summary judgment.

As the Court explained in its previous rulings, discharge from public employment is not the only event that can establish a liberty interest in one's reputation. When demamation occurs in connection with the violation of other kinds of constitutional rights, an injury to the plaintiffs' reputation implicates the deprivation of a liberty interest. *Marrero v. City of Hialeah*, 625 F.2d 499 (5 Cir. 1980). In *Marrero*, the police seized allegedly stolen items from Marrero's jewelry store and issued an announcement in local newspapers and on local radio stations that the stolen property had been recovered. The court held that Marrero's claim that the announcement damaged his reputation was a valid claim for relief under § 1983 because it was made in connection with the

unlawful search and seizure of his inventory. In this case, at Paragraph 9 of his complaint, Detro contends that on December 19, 1988 defendant Bill Lynch held a press conference at which he distributed a report on the investigation of Nicholls State University that contained libelous statements about Detro. The defamation, made in connection with other alleged constitutional violations, states a claim for relief. However, because the defamation and the related constitutional violations all occurred more than a year before Detro filed his complaint, this claim is time-barred. Although Detro's discharge occurred within the perspective period, the fact of his discharge plays no role in this *Marrero*-type claim.

Finally, Detro argues that his claim for deprivation of Fourth, Fifth, Sixth, and Fourteenth Amendment claims are not separate wrongs. However, plaintiff offers no support for this theory nor does he dispute the Court's findings of when he knew or had reason to know of the injuries which formed the basis of his claim. In short, this motion raises nothing which the Court has not previously considered.

Plaintiff's Motion for New Trial is DENIED.

New Orleans, Louisiana, June 27, 1990.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-5455

SECTION "F"

RANDALL A. DETRO

v.

BUDDY ROEMER, *et al.*

JUDGMENT
[Filed June 7, 1990]

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Buddy Roemer, Governor of Louisiana, Bill Lynch, David Morales, Elizabeth Schexnayder and Joe Green, and against plaintiff, Randall A. Detro, dismissing plaintiff's civil rights claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's state law claims are dismissed without prejudice.

New Orleans, Louisiana, this 6th day of June, 1990.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-5455

SECTION "F"

RANDALL A. DETRO

v.

BUDDY ROEMER, *et al.*

ORDER AND REASONS

[Filed June 4, 1990]

Randall Detro is the former Director of the Library at Nicholls State University. After an audit of the library revealed some problems with the cataloging and purchasing of library acquisitions, he was discharged. He now brings this civil rights action against Governor Buddy Roemer, Bill Lynch, the former Inspector General, and three former employees of the Office of the Inspector General, David Morales, Elizabeth Schexnayder, and Joe Green. In an earlier decision on the defendants' motion to dismiss, the Court held that the plaintiff's complaint tsates § 1983 claims for violation of Fourth, Fifth, Sixth and Fourteenth Amendment rights. Defendants now move for summary judgment.

The plaintiff's complaint, which was filed on December 22, 1989, states a number of discrete events: that the defendants searched and seized his office on July 22, 1988, that he was interrogated without counsel until August 22, 1988, that on December 19, 1988 the defend-

ants issued a report which libeled the plaintiff, and that on January 27, 1989 he was discharged from the position of Director of the Library. Except for his discharge, all of these events occurred more than one year before the filing of the plaintiff's complaint. Defendants contend claims based on these acts are prescribed.

I. *A Continuing Violation, Or Not?*

In *Wilson v. Garcia*, 471 U.S. 261, 276-280, 105 S.Ct. 1938, 1947-1950 (1985), the Supreme Court held that the appropriate statute of limitations to be applied in all § 1983 actions is the state statute of limitations governing actions for personal injury. Thus, the plaintiff's claim is subject to the one year perscription period for delictual actions set out in La.C.C. Art. 3492.

The plaintiff contends that the perscriptive period does not begin to run until the wrongful conduct ends. His position has been rejected by other courts. In *McCune v. City of Grand Rapids*, 842 F.2d 903 (6 Cir. 1988), McCune argued that his wrongful arrest, wrongful prosecution, and the wrongful suppression of evidence constituted a continuing tort and, therefore, the statute of limitations did not accrue until the continuing wrongful conduct ended. The Sixth Circuit rejected this argument:

> "the false arrest, malicious prosecution, and wrongful suppression of exculpatory evidence constitute discrete wrongs (i.e., separate torts with separate elements), and they will not be viewed by this court as a continuing violation."

842 F.2d at 906. The court went on to find that the claim for false arrest arose on the date the arrest was made and that the claim for malicious prosecution arose with the favorable termination of the underlying criminal proceeding. The Second Circuit rejected a similar argument in *Singleton v. City of New York*, 632 F.2d 185, 191 & n.5 (2 Cir. 1980) *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368 (1981).

A comparison to cases involving a conspiracy to deprive one's civil rights supports *McCune*. Where a conspiracy is alleged, the cause of action runs separately from overt act that is alleged to cause damage to the plaintiff. Thus, the plaintiff may recover only for the over acts that have occurred within the limitations period. The plaintiff cannot toll the running of the statute of limitations simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy. *Scherer v. Balkema*, 840 F.2d 437 (7 Cir. 1988); *Gibson v. United States*, 781 F.2d 1334 (9 Cir. 1986).

The principles just discussed must apply to this case; plaintiff's argument that the actions of the defendants constitute a continuing tort must fail. The plaintiff's claims for deprivation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights separate wrongs which do not comprise a continuing violation. The plaintiff cannot toll the running of the statute of limitations by asserting that a series of wrongs were committed by the same defendants. The Court must therefore examine each discrete claim to determine whether it is barred by the applicable statute of limitations. *See McCune*, 842 F.2d at 906. Guiding this inquiry is the notion that the prescripitve period for a § 1983 claim begins to run when the plaintiff knows or has reason to know of the injury which forms the basis of his claim. *Peter Henderson Oil v. City of Port Arthur*, 806 F.2d 1273, 1275 (5 Cir. 1987).

II. *The Claims*

A.

Plaintiff's first claim is that the defendants' search and seizure of his office deprived him of rights secured by the Fourth Amendment. The search and seizure, according to plaintiff's complaint, occurred on July 22, 1988. In his opposition to the defendants' motion, plaintiff states that he was present when his office was padlocked. At that

time, he knew or had reason to know of the injury which is the basis of his claim of deprivation of Fourth Amendment rights. This claim is therefore barred by the one year prescriptive period.

B.

Plaintiff's second claim is that the defendants deprived him of rights secured by the Fifth Amendment when they conducted a custodial interrogation without informing him of his right to remain silent. The plaintiff's § 1983 cause of action for failure to inform him of his Fifth Amendment rights accrues on the date on which the interrogation took place. Plaintiff's complaint states that he was ordered to appear for interrogation several times until August 22, 1988. Thus, plaintiff knew or had reason to know on August 22, 1988, at the latest, of the injury which is the basis of his claim for deprivation of Fifth Amendment rights. This claim is also barred by the one year prescriptive period.

C.

Plaintiff's third claim is for deprivation of Sixth Amendment rights. This claim arises out of the same interrogations that occurred through August 22, 1988 and is therefore similarly barred.

D.

Plaintiff's final claim is for deprivation of Fourteenth Amendment rights. Plaintiff alleges in his complaint that on December 19, 1988 the defendants held a press conference and distributed a report about the investigation of Nicholls State that libeled him. Plaintiff was later discharged, on January 27, 1989. Discharge from public employment under circumstances that put the employee's reputation at stake gives rise to a liberty interest under the Fourteenth Amendment which entitles one to a procedural opportunity to clear one's name. *Rosenstein v.*

City of Dallas, 876 F.2d 392, 395 (5 Cir. 1989). In its previous order, the Court held that plaintiff's complaint failed to state a § 1983 claim for the denial of a name clearing hearing upon which relief can be granted.

E.

Discharge from public employment is not the only interest that can establish a liberty interest in one's reputation. When the defamation occurs in connection with the violation of other kinds of constitutional rights, the injury to the plaintiff's reputation implicates the deprivation of liberty interest. *Marrero v. City of Hialeah*, 625 F.2d 499 (5 Cir. 1980). Here, the defendants issued a report criticizing the plaintiff on December 19, 1988, subsequent to the alleged violations of plaintiff's Fourth, Fifth and Sixth Amendment rights. Plaintiff's due process claim filed on December 22, 1989, more than one year later, therefore appears to be facially barred.

When an action appears to have prescribed on the face of the complaint, the plaintiff bears the burden of establishing facts which would interrupt or suspend prescription. *Ayo v. Johns-Manville Sales Corp.*, 771 F.2d 902 (5 Cir. 1985). The plaintiff has failed to meet this burden. He has offered no evidence tending to show that he did not know or had no reason to know that the allegedly libelous statements had been made on December 19, 1988, or their impact on him. Accordingly, the plaintiff's Fourteenth Amendment claim of deprivation of a liberty interest in his reputation because of a libel is time barred.[1]

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[1] When a public employee has a property interest in his continued employment, the state cannot deprive him of this property without due process. *Cleveland Br. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 1491 (1985). Property interests are not created by the Constitution; "they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law." *Id.* (citations omitted). Al-

III.

Accordingly, for the foregoing reasons, defendants' Motion for Summary Judgment is GRANTED as to plaintiff's civil rights claims. Plaintiff's pendant state law claims, to the extent he asserts them, are dismissed without prejudice. Judgment will be entered.

New Orleans, Louisiana, May 30, 1990.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

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though plaintiff refers to *Loudermill*, he does not contend or provide any evidence tending to show that he had a property interest in his position as the Director of the Library at Nicholls State University that would give rise to the right to a pretermination opportunity to respond and post-termination administrative procdeures. Thus, to the extent that the plaintiff claims the denial of due process based solely upon his discharge, defendants are entitled to summary judgment on this claim.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-5455

Section "F"

RANDALL A. DETRO

v.

BUDDY ROEMER, *et al.*

ORDER AND REASONS

[Filed March 26, 1990]

Plaintiff Randall Detro brings this civil rights action against Governor Buddy Roemer, Bill Lynch, David Morales, Elizabeth Schexnayder, and Joe Green. Mr. Lynch is the Governor's former Inspector General, and Mr. Morales, Ms. Schexnayder and Mr. Green are former employees of the Office of Inspector General. Plaintiff is the former library director at Nicholls State University. By direction of the Governor, the Inspector General conducted an audit of the affairs of Nicholls State. Plaintiff alleges that in the course of the investigation and his discharge from Nicholls State, defenders deprived him of rights secured by the First, Fourth, Fifth, Sixth, and Fourteenth Amendments.

Defendants now move to dismiss under Rule 12(b)(1) and 12(b)(6). They assert that (1) the Court lacks subject matter jurisdiction over this suit because it is barred by the Eleventh Amendment; (2) the facts do not establish a claim under 42 U.S.C. § 1933 or § 1985; and

(3) plaintiff has failed to allege any facts which establish a violation of § 1983 or § 1985 or which would defeat the qualified immunity of defendants. After defendants filed this motion, plaintiff filed a Supplemental and Amending Complaint. The Court will consider plaintiff's supplemental complaint in addition to his original complaint in deciding this motion.

I. Eleventh Amendment

Everyone agrees that the Eleventh Amendment is no bar to a suit against a public official in his individual capacity. *See Scheur v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974). In this case, a fair reading of his pleadings confirms that plaintiff is seeking to impose individual and personal liability on the named defendants. For example, in Paragraph 18 of his Supplemental and Amending Complaint, he alleges that defendants Schexnayder, Morales and Green conducted a warrantless and unreasonable search in violation of the Fourth Amendment. Similarly, in Paragraph 19, plaintiff alleges that these defendants interrogated him without advising him of his right to counsel in violation of the Fifth Amendment. The allegations that the named defendants deprived plaintiff of constitutional rights indicate that plaintiff seeks to impose personal liability upon them. Consequently, plaintiff's suit is no barred by the Eleventh Amendment.

II. Qualified Immunity

State officials who perform discretionary functions are entitled to some form of immunity from § 1983 actions for damages. *Austin v. Borel*, 830 F.2d 1356, 1358 (5 Cir. 1987). While officials who perform functions in the judicial process have absolute immunity, other exectuive officials are shielded by the more narrow qualified immunity. *Id.* Qualified immunity "shields only that conduct of clearly established constitutional rights of which a reasonable person would have known." *Id.* (citations

omitted). In other words, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 1362.

Qualified immunity is an affirmative defense that must be pleaded. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736 (1982). In *Harlow*, the Court instructed trial courts:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Id. at 2738.

Defendants argue that the Court should dismiss plaintiff's complaint because it fails to allege facts which would defeat the qualified immunity of defendants. This argument is without merit. Because qualified immunity is an affirmative defense which must be pleaded, the plaintiff need not anticipate the defense in his complaint. *Poe v. Haydon*, 853 F.2d 418, 424 (6 Cir. 1988) cert. denied 109 S.Ct. 788 (1989). If the defendant raises qualified immunity, the plaintiff has the opportunity to come forward with additional facts or allegations that show that the constitutional rights allegedly violated were clearly established when the acts were committed. *Id.* at

425. The shield of qualified immunity would then be unavailable.

Furthermore, an official who raises qualified immunity as an affirmative defense must establish that he was acting within the scope of his discretionary authority when the challenged conduct occurred. *Poe*, 853 F.2d at 425. In this case, plaintiff alleges in Paragraph 26 of his Supplemental and Amending Complaint that defendants' actions went beyond the scope of their authority. Assuming that allegation to be true for purposes of this motion, defendants are not entitled to immunity. Therefore, because plaintiff has stated allegations which, if true, would checkmate defendants' assertion of immunity, plaintiff's complaint has stated a claim upon which relief can be granted. Whether they can be proved is another matter for another day.

The entitlement to qualified immunity is more than a mere defense to liability; it is an entitlement not to stand trial. The qualified immunity doctrine is animated by the notion that where official conduct that does not implicate clearly established rights is concerned, the public interest is best served by official action taken with independence and without fear of consequences. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985). Its doctrinal goal is utilitarian: to prevent trials from distracting officials from discharging their governmental duties, inhibiting officials' discretionary action, and deterring able people from entering public service. *Id.* With this in mind, the Supreme Court has found it appropriate to have claims of immunity resolved before the commencement of discovery. *Id.* at 2815. It is the duty, then, of the trial court to resolve the question of immunity at an early stage so as to not frustrate the social purpose of immunity. Regrettably, however, a motion to dismiss is not the best vehicle, and defendants have not properly addressed the principles discussed to assist the Court in resolving this issue summarily.

III. Plaintiff's § 1985 claim

Defendants argue that plaintiff's complaint fails to state a claim under § 1985 upon which relief can be granted. Plaintiff does not contest this. Consequently, to the extent that plaintiff's complaint asserts a claim for damages under § 1985, that portion of the complaint is dismissed for failure to state a claim upon which relief can be granted.

IV. Plaintiff's § 1983 claim

Plaintiff alleges that defendants deprived him of rights secured to him by the First, Fourth, Fifth, Sixth and Fourteenth Amendments. It is not enough for plaintiff to assert mere conclusory allegations in a complaint alleging a violation of § 1983; he must state specific facts. *See Elliott v. Perez*, 751 F.2d 1472, 1479 (5 Cir. 1985) and cases cited within.

A. First Amendment

Defendants contend that plaintiff fails to state specific facts that would establish the deprivation of his First Amendment rights. Plaintiff does not dispute this. He asserts that he has been deprived of rights secured to him under the First Amendment, but he fails in his opposition to the motion to point to where in his complaint he states facts that support his claim. Accordingly, the Court finds that plaintiff's complaint fails to state a § 1983 claim for violation of First Amendment rights upon which relief can be granted.

B. Fourth Amendment

In Paragraph 18 of his Supplemental and Amending Complaint, plaintiff alleges that on July 22, 1988, defendants Schexnayder, Morales and Green searched and seized his office and personal papers without a warrant, without probable cause, without his consent, and without exigent

circumstances. Because defendants do not challenge the adequacy of this claim, the Court need not decide whether plaintiff states a § 1983 claim for deprivation of rights secured by the Fourth Amendment upon which relief can be granted.

C. Fifth Amendment

Defendants contend that plaintiff fails to state a Fifth Amendment claim because the Fifth Amendment applies only to criminal proceedings and because plaintiff fails to show some kind of compulsion. Assuming defendants' view of the law to be accurate, plaintiff's supplemental complaint passes muster. In Paragraph 19, plaintiff states that defendants conducted a criminal investigation and supports this with the point that during the course of the investigation other employees were Mirandized and threatened with arrest. Plaintiff further states in that same paragraph that he was ordered to his office for interrogation and was not free to leave. This fact, assumed to be true for purposes of this motion, establishes that this was arguably a custodial interrogation at which plaintiff had to be informed of his right to remain silent. *See Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Consequently, plaintiff's complaint states a § 1983 claim for deprivation of Fifth Amendment rights upon which relief can be granted.

D. Sixth Amendment

With regard to plaintiff's Sixth Amendment claim, defendants again assert that the right to counsel extends only to criminal or quasi-criminal proceedings. As explained in Part C, plaintiff states that the Inspector General was conducting a criminal investigation. Thus, plaintiff's complaint states a § 1983 claim for deprivation of Sixth Amendment rights upon which relief can be granted for purposes of this motion.

E. Fourteenth Amendment

The Fourteenth Amendment analysis is more intricate.

To state a § 1983 claim for violation of rights secured by the Fourteenth Amendment, plaintiff must first state facts which, if true, would establish the existence of a liberty or property interest. Defendants argue that plaintiff's claim that the report of the investigation distributed by defendants is libelous and slanderous does not state a cause of action under 1983. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976), the Supreme Court held that no liberty or property interest is infringed when the only loss suffered at the hands of the government is damage to personal repuation if personal reputation is not recognized by the relevant state law as a liberty or property interest. *Marrero v. City of Hialeah*, 625 F.2d 499, 513 (5 Cir. 1980) cert. denied, 450 U.S. 913, 101 S.Ct. 1353 (1981). However, some stigma plus an infringement of some other interest can infer a liberty or property interest. *See Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1215 (5 Cir. 1989).

To fulfill the stigma aspect of the stigma-plus equation, palintiff must state that the stigma was caused by a false communication that concretely asserted wrongdoing on the part of plaintiff. *Connelly*, 876 F.2d at 1215. Plaintiff does this in Paragraph 24 of his supplemental complaint. The additional interest requirement is still another hurdle.

Plaintiff attempts to meet the requirement of asserting the infringement of some other interest by pointing to his discharge. "Discharge from public employment under circumstances that put the employee's reputation, honor, or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name." *Rosenstein v. City of Dallas*, 876 F.2d 392, 395 (5 Cir. 1989) (citations omitted). Here, plaintiff states that he was denied a name-clearing hearing. That is not enough. To succeed on a § 1983 claim

for the denial of a name-clearing hearing, plaintiff must prove that: (1) he was discharged; (2) that defamatory charges were made against him in connection with the discharge; (3) that the charges were false; (4) that no meaningful public hearing was conducted pre-discharge; (5) that the charges were made public; (6) that he requested a hearing in which to clear his name; (7) and that the request was denied. *Id.* at 395-96. To state a claim for denial of a name-clearing hearing upon which relief can be granted, plaintiff must state facts that show the existence of all seven elements of the claim. Because plaintiff's complaint does not state that he requested a hearing in which to clear his name and that the request was denied, his complaint fails to state a § 1983 claim for the denial of a name-clearing hearing upon which relief can be granted. But the analysis does not end there.

Discharge from public employment, however, is not the only interest that will satisfy the stigma-plus requirement of *Paul v. Davis*. Damage to reputation plus the infringement of other kinds of Constitutional rights can establish a liberty or property interest. *See Marrero*, 625 F.2d at 519. In *Marrero*, the court found that stigma plus the deprivation of certain Fourth Amendment rights gave rise to a liberty interest. In this case, plaintiff adds claims for infringement of his Fourth, Fifth and Sixth Amendment rights. Thus plaintiff's complaint, by stating that the defamation occurred in connection with the violation of plaintiff's Fourth, Fifth and Sixth Amendment rights, states a deprivation of a liberty interest of property interest. Additionally, for Fourteenth Amendment purposes, plaintiff may allege facts that show that the defendants deprived him of a liberty or property interest without due process of law. *Id.* Here, because plaintiff states that he was denied any opportunity to be heard, he has stated a procedural claim upon which relief can be granted even though his name-clearing complaint is deficient. *Id.* at 520.

V. Conclusion

In sum, the Court finds that plaintiff's claim is not barred by the Eleventh Amendment and that plaintiff's complaint states facts which, if true, would defeat defendants' claim of qualified immunity. Defendants have not adequately addressed the principles which would resolve the issue of their qualified immunity. Further, the Court finds that plaintiff's complaint fails to state a § 1985 claim, a § 1983 claim for violation of First Amendment rights, and a § 1983 claim for denial of a name-clearing hearing upon which relief can be granted. The Court finds that plaintiff's complaint does state a § 1983 claim for violation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights.

Accordingly, defendants' Motion to Dismiss is GRANTED in part and DENIED in part. As to the issue of qualified immunity, the denial is without prejudice.

New Orleans, Louisiana, March 21, 1990.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3486

RANDALL A. DETRO,
Plaintiff-Appellant,

v.

BUDDY ROEMER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

[Filed May 29, 1991]

Before CLARK, Chief Judge, RONEY,* and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ John M. Duhé
United States Circuit Judge

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* Circuit Judge of the Eleventh Circuit, sitting by designation.